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In The

# Supreme Court of the United States

October Term, 1997

EXXEL/ATMOS, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD, and
UNITED STEELWORKERS OF AMERICA,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## REPLY BRIEF FOR PETITIONER

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## APPENDIX


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## PRELIMINARY STATEMENT

This reply brief is filed pursuant to Rule 15(6) to correct a factual omission of the National Labor Relations Board (NLRB or Board) and to respond to an argument made by the Board in seeking to distinguish the decision of the Third Circuit in *NLRB v. New Associates*, 35 F.3d 828 (3d Cir. 1994), which argument the Board did not make before the United States Court of Appeals for the District of Columbia Circuit.

It is also noted that the questions presented, as restated by the Board, ignore a principal issue raised by the petition, namely, resolution of the conflict between the District of Columbia Circuit and the Third Circuit (the jurisdiction in which Exxel/Atmos, Inc. is located) with regard to the rule established by the Third Circuit in *New Associates*. That rule, which is grounded in simple logic and fairness, is that absent other evidence that the Employer is aware of the insubstantiality of a decertification petition, the NLRB must, if requested, inform the Employer whether the petition is supported by a majority of its employees. In the absence of such a disclosure the Third Circuit will not follow the Board's ruling in *Dresser Industries, Inc.*, 264 NLRB 1088 (1982), which requires continued negotiations with an incumbent union pending resolution of the decertification procedure. In the Third Circuit, where such information had been requested and denied, a Board Order finding a violation will not be enforced, whereas in the District of Columbia Circuit apparently it will. The Court cannot ignore this striking and critical conflict with regard to basic principles of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (the Act). The issue cannot go away simply by being ignored, as the Board would apparently wish. Nor should the Board be permitted to raise, without response, an argument which it did not raise in proceedings before the Circuit Court of Appeals.

## THE BOARD'S FACTUAL STATEMENT

In its recitation of the procedural history and facts of this case, the Board states that in early January, 1995, one of the Company's employees gave the Company form letters in which approximately 13 employees indicated to the Board that they no longer wished to be represented by the Union. (Bd. Br., p. 6) The Board failed to point out, however, for obvious reasons, that when then-counsel to Exxel initially asked the Board whether the petition was signed by at least 50% of the current bargaining unit he also pointed out that the unit currently consisted of 23 employees. (Pe. App., 118a-119a) *Thus, the thirteen signatures supporting decertification represented a majority of the Company's current employees.*

## THE BOARD'S ARGUMENT

The Board contends that the decision of the Court of Appeals in this case is not in "direct conflict" with that of the Third Circuit in *New Associates*. (Bd. Br., p. 10) In support of that argument the Board states that in *New Associates* the employer was not under a court order to bargain and the Union was entitled only to a rebuttable presumption of continued majority status at the time of the filing of the decertification petition. (Bd. Br., p. 10) Interestingly, the Board never made that argument before the Court of Appeals. In fact, in its brief to the Court of Appeals the Board's entire discussion of *New Associates* is restricted to a footnote in which it relied exclusively upon the fact that *New Associates* was inapplicable where the employer had improperly brought about the filing of the decertification petition, or where its other unfair labor practices tainted the petition. (Supp. App. p. 2a)[1] The Board goes on to state that: "Moreover, there was no assertion in *New*

1. References to the petitioner's Supplemental Appendix are to the appendix appearing at the back of this brief.

*Associates* that the employer's unfair labor practices ha[d] caused the decertification petition to be filed in the first place." Citing 35 F.3d at 835. (As discussed *supra*, the Court of Appeals found no merit to any of the independent unfair labor practices alleged by the Board.) Finally, the Board states that in this case petitioner, unlike the employer in *New Associates*, refused to bargain and again withdrew recognition before the filing of a decertification petition and therefore cannot rely on that petition to support a claim that it had a reasonable doubt of the Union's majority status when it withdrew recognition. (Bd. Br., p. 10)

The latter statement is not only erroneous, but it contradicts the Board's earlier statement in its brief in which it said:

> On January 10, 1995, the Company canceled all bargaining sessions with the Union then scheduled for early 1995. . . . On January 26, one of the Company's employees filed a formal decertification petition with the Board. . . . The Company *thereafter* asserted that it was under no obligation to bargain until a decertification election was held. (Emphasis added.) (Bd. Br., p. 6)

It is obvious, therefore, that the Company did not withdraw recognition before the filing of a decertification petition. It suspended bargaining and, as conceded by the Board, withdrew recognition only after a "formal" petition was filed.[2]

It is true that the rule announced by the Third Circuit in *New Associates* permits of an exception where there is *evidence* that the employer had improperly participated in the preparation

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2. The word "formal" is significant when considered in light of the Board's brief to the Court of Appeals, in which it stated that the signed statements submitted by 13 of the Company's 23 employees were "evidently meant to serve as a decertification petition". (Supp. App., p. 2a)

and circulation of the decertification petition, or that the unfair labor practices of the Employer had caused the union to lose its majority status. 35 F.3d at 835, n.5. First, it should be pointed out that the Court of Appeals did not distinguish or discuss *New Associates* in any way. It simply cited *New Associates* without comment. (Pe. App., p. 13a) Certainly, the Court of Appeals, in rejecting the *New Associates* concept, could not have relied upon the Board's conclusion that the Employer instigated the filing of a decertification petition, since it specifically rejected that finding. Thus, the petition was not tainted as alleged by the Board. Nor could it have relied *sub silentio* upon the allegation that the Employer undermined the Union's status by the granting of a $100 bonus, since it found that the granting of such bonus did not violate the Act. Certainly, the Third Circuit, in requiring evidence of employer complicity in the filing of a decertification petition, did not intend to grant the Region *carte blanche* to deny a request for information concerning majority support of the petition simply upon the bare assertion of the Union or the unfounded conclusion of the Region, as in this case, that such unlawful participation had taken place.

It is true that the Court of Appeals held that Exxel's request did not excuse it from failing to comply with the court's earlier cease and desist order. However, it did not specifically distinguish *New Associates* on that ground, as suggested by the Board. In fact, in an earlier footnote the Court of Appeals stated:

> 4. An affirmative bargaining order and an order requiring an employer to cease and desist from refusing to bargain do not have the same consequences. Under settled Board practice only the former carries with it a decertification bar, preventing the employer from challenging the Union's majority status for a reasonable period of time. *See, e.g., Exxel/Atmos*, 28 F.3d at 1245;

*Caterair*, 22 F.3d at 1121-22, n.4. (Petitioner's Appendix, p. 12a)

Since no affirmative bargaining order was outstanding at the time, as stated in the above quoted footnote from the opinion of the Court of Appeals, the Employer indeed could have challenged the Union's majority status had the decertification petition been given official credibility by the Region's response to counsel that in fact it was supported by a majority of the Company's employees. Therefore, there is clearly a conflict between the District of Columbia Circuit and the Third Circuit which this court should resolve in order to preserve uniformity in the application of our national labor policy, as administered by the Board, and in order to permit Exxel employees, *finally*, after eight years, to freely express their will in a Board-conducted election.

## CONCLUSION

Based upon the foregoing and our original petition, the Court is urged to grant certiorari as to both questions presented by the petitioner.

Respectfully submitted,

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